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In the Supreme Court of the United States

OCTOBER TERM, 1992

CHEMICAL MANUFACTURERS ASSOCIATION and AMERICAN PETROLEUM INSTITUTE, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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1. The government agrees that the decision below is wrong, but it nevertheless recommends that the petition be denied. The only explanation the government offers is the unsupported assertion that no "important federal interests are at stake." U.S. Br. in Opp. 7. Two points, however, are undeniable: First, as we demonstrate below, the government's attempt now to denigrate the importance of this case contradicts EPA's repeated pronouncements, both before and after the court of appeals' decision, about the extraordinary practical significance of the regulations at issue. Second, absent review by this Court, the delicate balance struck by EPA in its regulations integrating the requirements of overlapping environmental statutes will be shattered. The affected industries will be compelled to bear the brunt of the new regulatory regime under RCRA as dictated by the court of appeals, without any of the accommodations for existing Clean Water Act

("CWA") treatment systems or Safe Drinking Water Act ("SDWA") injection wells that EPA deliberately built into its rulemaking.

As EPA explained in promulgating the "Third Third" rule, application of the land disposal restrictions to CWA and SDWA facilities would not provide significant environmental benefits but "would be a very significant change in the regulatory scheme for these facilities, and could cause major administration and enforcement problems for both EPA and these facilities." Pet. App. 103a. Referring specifically to CWA treatment systems, EPA said:

> The regulatory overlap of similar but not identical dilution rules would create significant regulatory disruption. . . .
>
> In this case, the general treatment requirements and associated dilution rules under the CWA are generally consistent with the similar requirements under RCRA. Relying on the existing CWA provisions is, thus, consistent with the goals of both Acts and avoids unnecessary duplication and potentially conflicting requirements.

Id. at 108a. Similarly, in the context of SDWA injection wells, EPA found that

> if EPA were to apply a dilution prohibition to nonhazardous wells at this time, there would be considerable disruption at facilities that EPA generally considers safe. On balance, EPA believes it is appropriate to exempt from the LDR prohibitions characteristic waste disposed below the characteristic level in these wells.

Id. at 110a.

EPA reiterated these points, in strong language, in the court of appeals. *See* EPA Br. at 64-65, quoted at Pet. 26; *see also* EPA Br. at 54-55 ("Application of the dilution prohibition so as to preclude this aggregation [of wastewaters] . . . would not provide significant additional

environmental protection and would cause great disruption of established and effective wastewater treatment systems"); at 70 ("the potential for disruption to sound wastewater treatment systems was all too obvious, and the environmental benefits of imposing a dilution prohibition uncertain but apparently modest"); at 75 ("The potential disruption to these environmentally sound practices is clearly documented, and few if any environmental benefits will result from applying a RCRA dilution prohibition to these wastewaters").

EPA's opinion did not change following the court of appeals' decision. To the contrary, on January 19, 1993, EPA again described the enormous impact that invalidation of the regulations here at issue will have on the affected industries. EPA estimated that the court of appeals' decision would impose new controls on 65 million tons (between 15 and 20 *billion* gallons) of wastewater per year. Supplemental Information Concerning the Environmental Protection Agency's Potential Responses to the Court Decision on the Land Disposal Restrictions Third Third Final Rule at 4. (EPA announced the availability of the Supplemental Information document at 58 Fed. Reg. 4972 (Jan. 19, 1993). A copy of the document has been lodged with the Clerk of this Court.) EPA further stated:

> [T]here is no question in the Agency's mind that there will be massive shortages of capacity to treat the wastes affected by the implementation of the Third Third opinion. For some wastes, notably the volumes of wastewaters now being injected and some wastes being treated in impoundments, there is simply insufficient treatment capacity available to manage these wastes. In other cases, treatment capacity may exist but it is not accessible without construction of significant infrastructure, a project taking considerable time. In other cases, changes may entail retrofitting of existing surface impoundments, construction or addition of on-site treatment capacity,

> or other types of in-plant modifications, again a process taking considerable time.

Supplemental Information document at 42. EPA acknowledged that all of the available options would involve tremendous costs and disruption for the affected industries, *id.* at 12-37, and it concluded that "the court's opinion cannot be meaningfully implemented without considerable delay to undertake what may be substantial changes in waste management . . . ." *Id.* at 42. Against the background of these repeated agency recognitions of the drastic effects of the court of appeals' decision, the government's casual and unsupported claim that this case does not present any "exceptional circumstances" involving "important federal interests" rings hollow.

Nor is the government correct in its effort to minimize the legal significance of the decision below by characterizing it as a mere misapplication of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* U.S. Br. in Opp. 7. Although the court of appeals purported to rely on *Chevron* in those portions of its opinion in which it sustained EPA regulations (*see, e.g.*, Pet. App. 21a), the court wholly ignored *Chevron* in that portion of its opinion that struck down the regulations now at issue. Pet. App. 37a-55a. The court failed to defer to EPA's interpretation of Section 3004, it failed to defer to EPA's interpretation of Section 1006(b)(1), and it overstepped proper judicial bounds by attempting to dictate the regulations that EPA must develop on remand. All of these errors are sufficiently important to warrant this Court's review, especially given the D.C. Circuit's prominent role in reviewing agency rulemaking and the pattern of past departures by the court of appeals from the proper judicial role. *See, e.g., National Railroad Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394 (1992); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Japan Whaling*

Association v. American Cetacean Society, 478 U.S. 221 (1986); *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

The government also seeks to minimize the importance of the court of appeals' decision when it addresses that court's refusal to defer to EPA's integration, under Section 1006(b) of RCRA, of the requirements of RCRA with those of the CWA and the SDWA. Although the government acknowledges that the court of appeals' decision is "potentially troubling to the extent that it might be read to curtail the EPA's general authority under Section 1006(b)," U.S. Br. in Opp. 8, it also asserts that the decision is limited to "this particular rulemaking" and will not serve as a precedent in future cases. *Id.* at 8-9. But nothing in the court of appeals' decision suggests such a limitation. Moreover, the government's speculation about *future* litigation improperly discounts the enormous practical importance of the *present* case in and of itself. Finally, the integration authority expressly conferred on EPA in Section 1006(b) reflects the broad delegation of rulemaking discretion to the Agency in RCRA as a whole. That broad delegation, which permits EPA to define what is hazardous waste in the first place and then to prescribe how such hazardous wastes should be treated, necessitated a statutory means for EPA to accommodate RCRA with other federal environmental laws. Furthermore, the broad discretion given to EPA under Section 1006(b) and RCRA as a whole is flatly inconsistent with the rigid interpretation of Section 3004(m) that formed the basis of the court of appeals' decision.

2. In contrast to the government, which appears to agree with petitioners that the court of appeals should have decided this case under "Step Two" of *Chevron* (*see* U.S. Br. in Opp. 7), the private respondents do

not even bother to address "Step Two" and instead contend that the court of appeals ruled correctly under "Step One" of the *Chevron* analysis. HWTC Br. in Opp. 10-13. This position is deficient for all of the reasons already set forth at some length in the petition.

The court of appeals failed properly to consider the language of the statute as a whole, and the ambiguity created thereby, in determining whether to defer to EPA's interpretation. Further, the court brushed aside EPA's efforts to interpret the relevant statutory provisions in a way that would respond to the real-world situations the agency was obligated to regulate. Although the court of appeals nowhere held that RCRA *required* EPA to adopt a "point of generation" rather than a "point of disposal" approach, the court nevertheless overturned EPA's decision to follow the former approach in some circumstances (where no other federal statute was implicated) and the latter in others (where the wastewater was already being managed in accordance with the CWA or the SDWA). The court's characterization of the challenged regulations as "radically at odds" with other aspects of the "Third Third" rule (Pet. App. 46a) overlooks the agency's effort to tailor its regulatory approach to the different situations being addressed.

Thus, although EPA concluded in general that it was inappropriate to allow dilution of certain characteristic hazardous wastes to avoid meeting the treatment standards, the agency reasonably determined that a different approach should be followed with respect to such wastes that were aggregated and then managed in CWA and SDWA systems. Contrary to the private respondents' assertion, such wastes are already managed in accordance with longstanding and stringent federal laws and regulations designed to protect human health and the environment. As a result, the regulatory situation confronted by EPA with respect to such wastes was significantly different from that prevailing in the ordinary land dis-

posal situation. EPA interpreted the statutory language in a way that would allow it to respond appropriately to the facts presented. Indeed, this kind of agency action is an ideal illustration of the purposes underlying *Chevron* "Step Two," which is intended to protect the implementing agency's flexibility in applying general statutory language to a variety of real-world situations.[1]

The private respondents conclude their submission by urging this Court to disregard the enormous detrimental impact of the court of appeals' decision on the affected industries. The private respondents first assert that petitioners' concerns are "alarmist and unfounded." HWTC Br. in Opp. 14. This statement is not only unsupported but it directly contradicts EPA's consistent, repeated findings cited above, based on the rulemaking record. Second, the private respondents argue that the burdens imposed by the court of appeals' decision are irrelevant, because they are mandated by RCRA. *Id.* This argument begs the central question raised in this proceeding, which is whether Congress in fact intended the results imposed by the court of appeals. If Congress had intended the massive disruption of EPA's existing CWA and SDWA regulatory schemes that will be required by the court of appeals' decision, with the attendant burdens imposed upon regulated industry, surely there would have been some indication of that intent somewhere in the language of the statute or in the underlying legislative history. Indeed, a court-imposed interpretation of a statute that creates such disruption in the face of a contrary interpretation by the federal agency charged with implementing the statute, is itself a strong justification for review by this Court.

[1] As described in the petition, the court of appeals' decision does violence to this needed flexibility, and has created troubling technical and policy issues relating to the implementation of the decision. Indeed, in the Supplemental Information document cited earlier, EPA requested comment on 130 separate technical and policy questions that must be answered in order to move from EPA's regulatory scheme to that mandated by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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